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No. 89-1696

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In the Supreme Court of the United States

OCTOBER TERM, 1990

PEABODY COAL COMPANY AND
OLD REPUBLIC INSURANCE COMPANY, PETITIONERS

v.

HUBERT C. TAYLOR AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

1. Whether the rebuttal provisions of a Department of Labor regulation satisfy Section 402(f)(2) of the Black Lung Benefits Act, which requires the Department to apply "[c]riteria * * * not more restrictive" than criteria applied during an earlier phase of the black lung program.

2. Whether the statute, if construed to invalidate the Department's rebuttal provisions, violates the constitutional guarantee of due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-14a) and its order denying rehearing (Pet. App. 1a-2a) are reported at 892 F.2d 503. The court of appeals' earlier opinion in this case (Pet. App. 18a-22a) is reported at 838 F.2d 227. The decision and order of the Benefits Review Board (Pet. App. 24a-27a) and the decision and order of the administrative law judge (Pet. App. 28a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1989, and the order denying petitions for rehearing was entered on February 1, 1990. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on May 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, provides benefits to former coal miners and their survivors for total disability or death due to pneumoconiosis. Disability claims filed by June 30, 1973, were considered by the Department of Health, Education, and Welfare (HEW) under regulations that included a presumption of entitlement to benefits (20 C.F.R. 410.490) that was available to certain claimants. Claims filed after that date are considered by the Department of Labor. Claims filed with the Department of Labor before April 1, 1980, are subject to Section 402(f)(2) of the statute, 30 U.S.C. 902(f)(2), which provides that the "[c]riteria" applied to those claims "shall not be more restrictive than the criteria applicable to a claim" adjudicated by HEW. See *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414, 417-419 (1988).

In response to Section 402(f)(2), Labor promulgated its own presumption regulation, 20 C.F.R. 727.203. While there were only two ways to invoke HEW's presumption (see 20 C.F.R. 410.490(b)(1)), there are five ways to invoke Labor's presumption. See 20 C.F.R. 727.203(a)(1)-(5). Once the presumption had been invoked, HEW's regulation specified that the presumption could be rebutted (1) by proving that the miner was doing his usual coal mine

work or comparable work or (2) by proving that the miner was capable of doing such work. 20 C.F.R. 410.490(c)(1) and (2). In contrast, Labor's regulation specifies four rebuttal methods. The first two generally correspond to the two specified HEW methods. 20 C.F.R. 727.203(b)(1) and (2). The third and fourth Labor methods allow a party contesting entitlement to defeat a claim either (3) by proving that the disability or death of the miner did not arise in whole or in part from coal mine employment or (4) by proving that the miner does not or did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).

2. In 1977, after 42 years of coal mining, respondent Hubert Taylor applied for black lung benefits. Pet. App. 29a, 31a. A deputy commissioner in the Department of Labor's Office of Workers' Compensation Programs (OWCP) initially found him eligible for benefits, but petitioner Peabody Coal Company, the responsible coal mine operator, contested eligibility and obtained a hearing before an administrative law judge. Pet. App. 30a.

The ALJ concluded that Taylor would be ineligible for benefits under Labor's interim presumption. The ALJ concluded that Taylor had invoked the presumption of eligibility based on his 42 years of coal mining and on x-ray evidence showing pneumoconiosis. Pet. App. 6a, 36a. But the ALJ found that Peabody Coal had rebutted the presumption under Labor's second method of rebuttal (20 C.F.R. 727.203(b)(2)) by proving that Taylor had only a mild respiratory impairment that did not prevent him from doing his usual coal mine work. Pet. App. 6a, 37a-38a.

However, the ALJ concluded that HEW's regulation applied to the claim and awarded benefits. Pet. App. 39a n.3. Under HEW's regulation, Taylor's

coal mine-related pneumoconiosis also invoked a presumption of eligibility. *Id.* at 39a. Although HEW's second rebuttal provision was very similar to Labor's, the ALJ concluded that rebuttal was unavailable under Labor's method because HEW's regulation had been construed differently. Specifically, in *Haywood* v. *Secretary of Health & Human Services*, 699 F.2d 277 (6th Cir. 1983), the court held that under HEW's second provision the presumption "can be rebutted only by evidence establishing that the Claimant is not vocationally disabled." That is, the court concluded that under HEW's provision, the Secretary had to show that the claimant could obtain work as a miner in the immediate area of his residence. Pet. App. 39a; see also *Haywood*, 699 F.2d at 285. Because "no evidence was offered" to show that Taylor could return to coal mine work in the area where he lived, the ALJ found HEW's presumption unrebutted and held that Taylor was entitled to benefits. Pet. App. 39a.

2. The Benefits Review Board reversed. Pet. App. 24a-27a. The Board held that Labor's regulation applied, rather than HEW's. *Id.* at 26a. Because Taylor had not challenged the ALJ's finding of rebuttal under Labor's regulation, the Board affirmed the denial of benefits on that basis. *Id.* at 27a.

3. The court of appeals affirmed. Pet. App. 18a-22a. It agreed with the Board that Section 402(f)(2) of the statute required Labor only to apply *medical* criteria that were no more restrictive than HEW's medical criteria, and did not require Labor to apply all of HEW's other rules. Pet. App. 21a-22a. After this Court rejected that reading of the statute in *Sebben* (109 S. Ct. at 421), it vacated the court of appeals' decision in this case and remanded for reconsideration in light of *Sebben*. Pet. App. 23a.

4. On remand, the court of appeals reinstated the ALJ's award of benefits. Pet. App. 4a-14a. The court did not state which rebuttal methods were at issue in the case, but it determined that Labor's "criteria" generally differed from HEW's because "all relevant medical evidence" must be considered under Labor's rebuttal provisions, while HEW's presumption "cannot be rebutted by medical evidence." *Id.* at 8a. Moreover, in the court's view, HEW's regulation did not allow rebuttal by Labor's third method (proof, by medical evidence, that total disability or death did not arise in whole or in part from coal mining) or Labor's fourth method (proof, by medical evidence, that the miner does not or did not have pneumoconiosis). *Ibid.* Labor's consideration of medical evidence, in the court's view, violated the statute. *Id.* at 9a.

The court recognized that the Sixth Circuit had upheld Labor's rebuttal provisions in *Youghiogheny & Ohio Coal Co.*, v. *Milliken*, 866 F.2d 195 (1989), and other cases, but "respectfully disagree[d]" with the Sixth Circuit's decisions. Pet. App. 9a. The court also rejected Peabody Coal's argument that precluding proof that petitioner is not totally disabled on account of pneumoconiosis violated due process. *Id.* at 13a. In the court's view, Section 402(f)(2), "in forbidding consideration of certain criteria on rebuttal, [does not] operate[] in a 'purely arbitrary' manner." Pet. App. 13a.

In an order denying rehearing, the court suggested that there might be some circumstances when HEW's regulation allowed medical rebuttal, but reaffirmed that "to the extent the Department of Labor regulations allow rebuttal—when HEW's do not—the Labor rules are invalid." Pet. App. 2a.

ARGUMENT

We agree with petitioners that the court of appeals erred with respect to the questions presented for review and that this Court should review those questions. The same questions are presented, however, in other cases pending before this Court, and we do not believe that this case is an appropriate vehicle for plenary consideration.

1. In *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414 (1988), this Court held that the *invocation* portion of Labor's presumption (which is not at issue here) violates Section 402(f)(2)'s command to apply "criteria" no more restrictive than those applied by HEW. The Court did not decide whether Labor's *rebuttal* provisions were valid because the respondents in *Sebben* had conceded their validity. 109 S. Ct. at 423. For the same reason, the Court did not decide whether application of Labor's rebuttal methods was constitutionally required. *Ibid.*

Since *Sebben*, four courts of appeals have addressed the validity of Labor's rebuttal provisions. The Third and Sixth Circuits have upheld the provisions. *Bethenergy Mines, Inc.* v. *Director, OWCP*, 890 F.2d 1295 (3d Cir. 1989), petition for cert. pending *sub nom. Pauley* v. *Bethenergy Mines, Inc.*, No. 89-1714 (filed May 7, 1990); *Youghiogheny & Ohio Coal Co.* v. *Milliken*, 866 F.2d 195 (6th Cir. 1989). In both of those cases, miners invoked Labor's presumption by proving the existence of pneumoconiosis. 890 F.2d at 1296; 866 F.2d at 197. In both cases, benefits were denied because coal mine operators proved under Labor's third rebuttal method (20 C.F.R. 727.203(b)(3)) that the miners' disabilities did not arise in whole or in part from the disease. 890 F.2d at 1296, 1299; 866 F.2d at 197.

The court below and the Fourth Circuit, on somewhat different facts, have invalidated parts of Labor's rebuttal regulation. In *Taylor* v. *Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), petition for cert. pending, No. 90-113 (filed July 17, 1990), an ALJ concluded that a miner who had invoked the presumption did not have pneumoconiosis, so that the relevant operator had rebutted the presumption under Labor's fourth method. 895 F.2d at 179. The ALJ also concluded that the miner was not totally disabled (in whole or in part) as a result of pneumoconiosis, so that the presumption had been rebutted under Labor's third method as well. *Ibid.* The Fourth Circuit concluded that Labor's four rebuttal methods "permit rebuttal of more elements of entitlement than do the interim HEW regulations which permit rebuttal solely through attacks on the element of total disability," and held that they were contrary to Section 402(f)(2). 895 F.2d at 182-183. Accord *Dayton* v. *Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990), petition for cert. pending, No. 90-114 (filed July 17, 1990).[1]

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[1] In *Taylor* v. *Clinchfield Coal*, the Fourth Circuit found no substantial evidence of rebuttal under Labor's third method, but suggested that HEW's regulation might have allowed a third method of rebuttal "similar" to Labor's third method, and remanded for consideration of that issue. 895 F.2d at 183. In an unpublished decision following *Taylor* v. *Clinchfield Coal*, the court concluded that this suggestion was "dicta" and that HEW's regulation allowed only two rebuttal methods. *Robinette* v. *Director, OWCP*, No. 88-1144 (4th Cir. Apr. 27, 1990), slip op. 8 & n.9, petition for cert. pending (filed July 25, 1990). See also *Krahel* v. *Consolidation Coal Co.*, No. 89-2394 (4th Cir. Apr. 5, 1990) (unpublished), slip op. 5-6 ("we have recently held that application of the rebuttal provisions of 20 C.F.R. § 727.203(b)(3) and (4) violates 30 U.S.C. § 902(f)").

In this case, an ALJ concluded that the presumption had been rebutted under Labor's second method by medical evidence that the miner had only a mild respiratory impairment that did not prevent him from doing his usual coal mine work. Pet. App. 37a-38a. The ALJ awarded benefits on the theory that HEW's second rebuttal method, unlike Labor's second method, required proof that a miner was not "vocationally disabled," *i.e.*, could actually obtain work as a miner. *Id.* at 39a.

While this case turns on a narrow issue relating to the second rebuttal provision, the court of appeals, in affirming the award of benefits, spoke broadly. It construed HEW's regulation not to allow rebuttal by medical evidence generally or by medical evidence satisfying Labor's third or fourth rebuttal methods. Pet. App. 8a. Because Labor's rebuttal rules allow consideration of such evidence, the court concluded that the rules violated the statute. *Id.* at 9a. In its order denying rehearing, the court suggested that some medical evidence could be considered under HEW's regulation, but confirmed that it had "held that to the extent the Department of Labor regulations allow rebuttal—when HEW's do not—the Labor rules are invalid." *Id.* at 1a-2a. See also *Meyer* v. *Zeigler Coal Co.*, 894 F.2d 902, 905 n.3 (7th Cir. 1990) ("this court held in [*Taylor* v. *Peabody Coal*] that § 727.203(b)(3) was invalid"), petition for cert. pending, No. 89-7383 (filed Apr. 27, 1990).

The courts of appeals have acknowledged the conflict. Both the Fourth Circuit, 895 F.2d at 183 n.2, and the court below, Pet. App. 9a-11a, noted their disagreement with the approach of the Sixth Circuit. The Third Circuit also noted the conflict between the

Sixth Circuit and the court below "as to issues similar to those before us," and declined to attempt to harmonize the decisions. 890 F.2d at 1302-1303. And the dissenting judge in the Fourth Circuit recognized the conflict among all four circuits, stating that "[i]t seems to me that by adopting the views of the Third and Sixth Circuits concerning these murky and confusing regulations we [would] do less violence to congressional intent, and [would] avoid both upsetting the statutory scheme and raising due process problems." 895 F.2d at 184; see also *Robinette* v. *Director, OWCP*, No. 88-1144 (4th Cir. Apr. 27, 1990) (unpublished), slip op. 7-8 n.8 (asking the Court to "definitively resolve this conflict"), petition for cert. pending (filed July 25, 1990).

2. In our view, the conflict in the circuits requires this Court's resolution.[2] However, we do not believe that this case should be the vehicle for plenary consideration. The primary issue here is a narrow one relating to the validity of one aspect of Labor's sec-

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[2] Although Section 402(f)(2) applies only to claims filed before April 1, 1980 (see *Sebben*, 109 S. Ct. at 418-419), the conflict among the courts of appeals can still be expected to have a significant, detrimental impact on the administration of the black lung program. An estimated 2,000 to 3,500 claims governed by Section 402(f)(2) are still in litigation, and we believe that a high percentage of them are affected by the conflict. Because the present value of a single black lung claim has been estimated at between $118,316 and $185,656, see Employment Standarads Admin., United States Dep't of Labor, *Annual Report on Administration of the Black Lung Benefits Act for Calendar Year 1979*, at 32 (1980), the claims have great importance to individual claimants and, given their cumulative value (as much as $650 million), great importance to the coal industry.

ond rebuttal method—whether a coal mine operator must present vocational evidence showing that a claimant can obtain coal mine work in order to rebut the presumption. Regardless of this Court's resolution of this issue, it would be unnecessary in the circumstances of this case for the Court to address directly the permissibility of Labor's third and fourth rebuttal methods.[3]

Furthermore, consideration of the validity of Labor's second method of rebuttal raises issues different from those raised by the third and fourth methods. As discussed above, the language of Labor's second method is materially the same as the language of HEW's second method. The ALJ's decision requiring vocational evidence (proof of a miner's ability to obtain coal mine work in the immediate area of his residence) under HEW's regulation was based solely on the Sixth Circuit's 1983 construction of that regulation in *Haywood*. See Pet. App. 39a; 699 F.2d at

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[3] The ALJ found that the operator had failed to rebut under either the third or fourth methods (Pet. App. 38a), and the court of appeals did not address the ALJ's findings. Moreover, the ALJ's findings appear to be correct. Labor's third rebuttal method requires proof that a disability did not arise "in whole or in part" from coal mine employment, and its fourth method requires proof that the miner does not or did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4). It is undisputed that respondent Taylor had pneumoconiosis, the method by which he invoked Labor's presumption, and substantial evidence will likely support the ALJ's finding that this disease, although mild, contributed to his disability. Pet. App. 38a. Cf. *Wetherill* v. *Director, OWCP*, 812 F.2d 376, 380 (7th Cir. 1987) (proof of *no* respiratory impairment, while probably insufficient under Labor's second method, would rebut under the third method).

285. The issues concerning Labor's second method are therefore whether *Haywood* correctly construed HEW's language—contrary to other interpretations of identical language in Labor's regulation [4]—and, if so, whether Section 402(f)(2) required Labor to adopt this interpretation when it promulgated 20 C.F.R. 727.203.

Neither of these issues is relevant to determining the validity of Labor's third and fourth rebuttal methods. These latter methods involve inquiries into whether a miner's disease or disability arose out of coal mine employment, while the second method relates to whether a miner is totally disabled. See *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 150-151 n.26 (1987). One question concerning the validity of the third and fourth methods is therefore whether HEW's regulation, which specified rebuttal only by methods comparable to Labor's first two rebuttal methods, nevertheless allowed the inquiries into causation that take place under Labor's third and fourth methods. If the Department of Labor correctly concluded that HEW did allow such inquiries, then Labor's third and fourth methods are valid. See 43 Fed. Reg. 36,826 (1978) (Department of Labor's view that HEW did allow four methods); *Bethenergy*, 890 F.2d at 1302 & n.8 (agreeing with

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[4] The courts of appeals have by and large construed Labor's "usual coal mine work" rebuttal method not to require vocational evidence. See *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985); *Taft* v. *Alabama By-Products Corp.*, 733 F.2d 1518 (11th Cir. 1984); *Director, OWCP* v. *Beatrice Pocahontas Co.*, 698 F.2d 680 (4th Cir. 1983); *Sherry* v. *Tesone Coal Co.*, 4 Black Lung Rep. (MB) 1-377 (Ben. Rev. Bd.), aff'd, 696 F.2d 985 (3d Cir. 1982).

the Department). If HEW's regulation did not allow such inquiries, then the validity of Labor's third and fourth methods turns on whether Section 402(f)(2) required Labor to limit rebuttal to the two HEW methods. See *Bethenergy*, 890 F.2d at 1299-1301 (statute does not prohibit these inquiries). Petitioners' due process argument similarly relates to the third and fourth methods, as they contend that it would be unconstitutional to order them to pay benefits without permitting them to prove that the claimant is not totally disabled as a result of coal mine employment. See Pet. 18-21. That due process argument has no bearing on the question whether a coal mine operator must present vocational evidence in order to rebut the presumption.

We believe the Court should grant review in a case where Labor's third and fourth methods are directly at issue. Those methods are more important than the second method because they allow a broader range of rebuttal. Parties contesting eligibility do not frequently succeed under Labor's second method because recent courts of appeals decisions require them to prove under this method that a miner does not have *any* impairment, respiratory or nonrespiratory, that prevents him from doing his usual coal mine work. See, *e.g.*, *Martin* v. *Alabama By-Prods. Corp.*, 864 F.2d 1555, 1557 (11th Cir. 1989), and cases cited.[5] In contrast, proof of the absence of any respiratory or pulmonary impairment will rebut under Labor's

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[5] The ALJ, who decided this case before those court decisions had been issued, erroneously found rebuttal under Labor's second method by proof that the claimant was not totally disabled as a result of a respiratory or pulmonary condition. Pet. App. 37a-38a. The claimant did not challenge this finding, however. *Id.* at 27a.

third method, *Wright* v. *Island Creek Coal Co.*, 824 F.2d 505 (6th Cir. 1987), and proof that a respiratory or pulmonary impairment is not pneumoconiosis will rebut under Labor's fourth method, see 20 C.F.R. 727.203(b)(4). Because applicants for black lung benefits are frequently aging miners who have some disability, Labor's third and fourth methods usually provide the only realistic possibilities of rebutting a presumption of entitlement. See also Prunty & Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. Va. L. Rev. 665, 695 (1989) (agreeing that Labor's second method is unavailable in most cases).

3. If the Court decides to review the validity of Labor's third and fourth methods in an appropriate case, we do not believe it necessary for the Court to grant review in this case as well in order to determine the validity of Labor's second rebuttal method. As discussed above, the second method is distinct from and not as important as the third and fourth methods. Moreover, the court below viewed the issue so broadly that it did not address the specific issues regarding the validity of Labor's second method; indeed, it did not seem to recognize that the case turns on whether Labor's second rebuttal method requires vocational evidence. These factors would likely create unnecessary complications for the Court.

In addition, respondent Hubert Taylor died on April 27, 1988, 12 days after he filed the prior petition for a writ of certiorari in this case. We believe it would have been proper for this Court to grant a timely motion to substitute his personal representative. But Rule 35.1 of the Rules of this Court (formerly Rule 40.1) provides that "[t]he substitution of

a representative of the deceased * * * must be made within six months after the death of the party, or the case shall abate," and no such motion was made within the specified period. See *Snyder* v. *Buck*, 340 U.S. 15, 21 (1950).

In May 1990, Mr. Taylor's representative filed a motion for substitution in this Court.[6] If the Court concludes that the action has not abated and grants the substitution motion, the proper disposition, in our view, is for the Court to hold this case while it determines the validity of Labor's third and fourth rebuttal methods by reviewing one of the other pending cases. The court below appears to have believed that it invalidated Labor's third and fourth methods, as well as its second, by characterizing its decision as holding that "to the extent the Department of Labor regulations allow rebuttal—when HEW's do not—the Labor rules are invalid." Pet. App. 2a. If this Court upholds the validity of the third and fourth methods, the rationale for the decision below would presumably be undermined and the court of appeals should therefore have an opportunity for reconsideration of that decision.

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[6] The Court had not acted on this motion by July 20, 1990.

CONCLUSION

If the substitution motion is granted, the petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of the petition in *Pauley* v. *Bethenergy Mines Corp.*, No. 89-1714, or *Consolidation Coal Co.* v. *Dayton*, No. 90-114.[7]

Respectfully submitted.

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[7] In our responses to the certiorari petitions in these two cases, we set forth more fully our reasons for believing that, of the petitions currently before the Court, they are the strongest candidates for plenary consideration.

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